

D/F

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

X

ROBERT MASON,

11-CV-275 (ARR)

Petitioner

NOT FOR PRINT  
OR ELECTRONIC  
PUBLICATION

-against-

JOHN B. LEMPKE, Superintendent,  
Five Points Correctional Facility,

MEMORANDUM  
AND ORDER

Respondent.

X

ROSS, United States District Judge:

On January 14, 2011, petitioner filed this pro se petition seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his 1986 Richmond County conviction. For the reasons set forth below, the court cannot consider the instant petition and transfers it to the United States Court of Appeals for the Second Circuit.

**Procedural Background**

On February 5, 1997, petitioner filed a petition seeking a writ of habeas corpus under 28 U.S.C. § 2254 challenging the same burglary and robbery conviction challenged herein. Mason v. New York State Department of Corr. Services, 97-CV-0615 (ERK) (E.D.N.Y. denied August, 14, 1997). Petitioner filed five subsequent petitions in this court challenging the same conviction. Each of the five petitions was transferred to the United States Court of Appeals for the Second Circuit ("Second Circuit") pursuant to 28 U.S.C. § 2244, and the Second Circuit has denied petitioner's applications to file a second or successive petition each time. Mason v. McGinnis, 99-CV-1257 (ARR) (E.D.N.Y. transferred petition June 29, 1999, application denied

by Second Circuit June 3, 1999); Mason v. McGinnis, 00-CV-3623 (ERK) (E.D.N.Y. transferred petition July 26, 2000, application denied by Second Circuit September 26, 2000); Mason v. Conway, 05-CV-2011 (ERK) (E.D.N.Y. transferred petition April 29, 2005, application denied by Second Circuit July 7, 2005); Mason v. Lempke, 07-CV-4382 (ARR) (E.D.N.Y. transferred petition December 19, 2007, application denied by Second Circuit February 21, 2008); Mason v. Bellnier, 09-CV-1757 (ARR) (E.D.N.Y. transferred petition May 12, 2009). Recently, petitioner filed a seventh petition in this court challenging the same conviction. Mason v. Lempke, 10-CV-4801 (ARR). It was transferred to the Second Circuit by order dated October 26, 2010. Petitioner now files his eighth § 2254 petition for a writ of habeas corpus, this time arguing he is entitled to relief because he recently learned that his trial counsel had a drinking problem which affected his performance.

### **Discussion**

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) “allocates jurisdiction to the courts of appeals, not the district courts, to authorize successive habeas motions or applications.” Torres v. Senkowski, 316 F. 3d 147, 151 (2d Cir. 2003); see 28 U.S.C. § 2244(b)(3)(A).<sup>1</sup> Subsection (b)(3)(c) of § 2244 directs that:

[t]he court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

Therefore, petitioner must move in the United States Court of Appeal for the Second

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<sup>1</sup>28 U.S.C. § 2244(b)(3)(A) provides that:

[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

Circuit for permission to pursue this application. 28 U.S.C. § 2244(b)(3)(A). Any motion to the Circuit must show that the new claim being raised by the instant application relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable, 28 U.S.C. § 2244(b)(2)(A), or the factual predicate for the claim could not have been discovered previously through the exercise of due diligence and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(B)(i-ii).

### **Conclusion**

Because this is a successive petition for a writ of habeas corpus challenging the same conviction, this court lacks jurisdiction to address it. Accordingly, the instant petition for a writ of habeas corpus is transferred to the United States Court of Appeals for the Second Circuit. This order closes this case. If the Second Circuit authorizes petitioner to proceed in this matter, petitioner shall move to reopen this case under this docket number.

SO ORDERED.

/Signed by Judge Ross/

ALLYNE R. ROSS  
United States District Judge

Dated: January 31, 2011  
Brooklyn, New York

SERVICE LIST:

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86-A-7415

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